

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
July 6, 2004 Session

MARY JANE WOODALL v. HARRY MICHAEL WOODALL

**Appeal from the Circuit Court for Franklin County
No. 10,421-CV J. Curtis Smith, Judge**

No. M2003-02046-COA-R3-CV - Filed October 15, 2004

In this appeal, a former husband seeks to be relieved of his obligation to pay alimony *in futuro* to his former wife. In support of his request, the former husband asserts there have been various changes of circumstances, including his former wife's cohabitation with another man. Although the trial court reduced the monthly support payment, it denied the former husband's petition to be relieved entirely from his alimony obligation, finding that his former wife was not living with a third person at the time of trial, that little support from the third party was involved, and that no other material change in circumstances had occurred to warrant modification of the initial award of alimony. We affirm the denial of the husband's petition to be relieved of his alimony obligation.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court
Affirmed**

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which WILLIAM B. CAIN and FRANK G. CLEMENT, JR., JJ., joined.

Mark Stewart, David Stewart, Winchester, Tennessee, for the appellant, Harry Michael Woodall.

Joseph E. Ford, Winchester, Tennessee, for the appellee, Mary Jane Woodall.

OPINION

In September of 1997, Mary Jane Woodall was granted a divorce by default from Harry Michael Woodall after a twenty-six year marriage. At the time of the divorce, Mr. Woodall was employed as a postal clerk earning \$36,000. In contrast, Ms. Woodall was self-employed and operated a beauty salon. Ms. Woodall's earning capacity was adversely affected by medical conditions, specifically disc problems in her neck that required fusion surgery prior to the divorce.¹

¹Even after the surgery, Ms. Woodall suffered neck pain and shoulder pain, and her arms would often become numb after cutting hair. The condition made more difficult many of the activities involved in being a hairdresser. Ms.

(continued...)

As part of the divorce, Mr. Woodall was ordered to pay alimony in the amount of \$1500 per month.²

In early 2002, Mr. Woodall filed a petition to eliminate or reduce his payment of alimony based on allegations that a material change of circumstances had occurred. Prior to trial, Ms. Woodall was made aware that her former husband would be alleging cohabitation as a basis for the elimination of alimony. In January, 2003, the trial court “terminated” Mr. Woodall’s payment of alimony until the modification hearing on February 18, 2003. At trial, Mr. Woodall orally amended his petition without objection to allege that his former wife had been cohabiting with and being supported by and or supporting a third party and, as a result of the cohabitation, elimination of his alimony payments was justified under Tenn. Code Ann. 36-5-105.³ In addition, Mr. Woodall insisted that additional material changes of circumstances existed: (1) Ms. Woodall was capable of generating more income from her beauty salon and (2) less alimony was needed since she was no longer supporting their son.

Following the hearing, the trial court ordered that the alimony award be reduced from \$1500 to \$1250 per month. Mr. Woodall complains the trial court erred by only reducing the alimony by \$250. Ms. Woodall does not appeal the reduction.⁴

In its final order, the trial court considered the general change of circumstances first and made the following findings:

Mr. Woodall has failed to prove a substantial and material change of circumstances. His own financial circumstances have not changed for the worse; actually his yearly income has increased substantially and he earns \$36,000 to \$38,000 per year. He lives with a girlfriend who earns an income equal to his. Ms. Woodall testified she earns approximately \$300 per week; the same now as when the divorce was granted. Mr. Woodall advances two circumstances to establish a substantial and material change of circumstances; that Ms. Woodall lived for a period of time with Aubrey Bishop and that her youngest son has now left home. While these events constitute a change of circumstance, they do not establish a substantial and material change of circumstance. Mr. Bishop provided relatively little support for Ms. Woodall and the relationship had ended by the date of hearing. As to the second circumstance, it is

¹(...continued)

Woodall testified that she was unable to work a full week, tried to put in four days a week, but sometimes only worked three.

²The decree did not specify whether the alimony was *in futuro* or rehabilitative; however, no date was given for the payments to end. The trial court held it was alimony *in futuro*. We agree.

³Ms. Woodall did not object to the amendment, and the issue was litigated at the hearing. In its final order the trial court amended the pleadings to conform to the proof.

⁴Not only did Ms. Woodall not appeal the decrease, at oral argument her counsel repeated that she did not appeal the reduction and was not making an issue of it. Thus, any issues regarding the reduction have been waived.

expected and foreseeable a son would leave home. Mr. Woodall also argues Ms. Woodall has not reported all her income for some years, including many years during the marriage. Even if Mr. Woodall is correct he admits he knew of the practice at the time of the divorce, therefore it was foreseeable such would continue.

With regard to the effect of the cohabitation, or Mr. Woodall's "theory that T.C.A. § 36-5-101(a)(3) applies and warrants a total elimination of alimony," as the trial court phrased it, the court made the following findings:

The proof established that Ms. Woodall lived with Mr. Bishop from October of 2001 until June of 2002. For several months, thereafter she stayed part-time with Mr. Bishop to care for him until August 2002. Both she and Mr. Bishop admitted the relationship was first an intimate one but became a "nurse-patient" relationship after he was diagnosed with cancer in May of 2002. The operation of T.C.A. § 36-5-101(a)(3) does not depend on a liaison, sexual or otherwise. The effect of the statute was to change the method of getting at a change of circumstances. Once a finding is made that the alimony recipient is living with someone else, the burden shifts to the recipient to show she needs the amount of support previously awarded.

The court went on to hold that the burden had shifted, *i.e.*, that Ms. Woodall had the burden to prove she still needed the amount of support previously awarded. The court found the list of expenses submitted by Ms. Woodall "grossly inflated"⁵ and, after considering the "credible evidence of her monthly expenses," found she had established a need for monthly support of \$1250 and reduced Mr. Woodall's alimony obligation accordingly.

I. MODIFICATION OF SUPPORT AWARD

Modifications of alimony may be granted only upon a showing of a substantial and material change in circumstances since entry of the original support order. Tenn. Code Ann. §36-5-101(a)(1); *Bogan v. Bogan*, 60 S.W.3d 721, 727-28 (Tenn. 2001). In order to be material, a change in circumstances must have been unforeseeable, unanticipated, or not within the contemplation of the parties at the time of the decree. *Id.* at 728; *Elliot v. Elliot*, 825 S.W.2d 87, 90 (Tenn. Ct. App. 1991). To be considered substantial, the change must significantly affect either the obligor's ability to pay or the obligee's need for support. *Bogan*, 60 S.W.3d at 728; *Bowman v. Bowman*, 836 S.W.2d 563, 568 (Tenn. Ct. App. 1991).

Even a substantial and material change of circumstances does not automatically result in a modification. Modification must also be justified under the factors relevant to an initial award of alimony, particularly the receiving spouse's need and the paying spouse's ability to pay. *Bogan*, 60 S.W.3d at 730; *Wright*, 83 S.W.3d at 773. "As evidenced by its permissive language, the statute

⁵The court questioned Ms. Woodall about some of the items listed on her expense statement, and she explained that some of those pointed out were actually yearly expenses, *e.g.*, license fees for her shop.

permitting modification of support awards contemplates that a trial court has no duty to reduce or terminate an award merely because it finds a substantial and material change of circumstances.” *Bogan*, 60 S.W.3d at 730. Where there has been such a change of circumstances, the ability of the obligor spouse to provide support must be given equal consideration to the obligee spouse’s need. *Id.*

Generally, the party seeking the modification bears the burden of proving the modification is warranted. *Azbill v. Azbill*, 661 S.W.2d 682, 686 (Tenn. 1983); *Wright*, 83 S.W.3d at 772; *Elliot*, 825 S.W.2d at 90. However, the legislature has identified one change in circumstances that will trigger a review of the continued need for alimony and that shifts the evidentiary burden. The relevant provision, Tenn. Code Ann. § 36-5-101(a)(3), sometimes referred to as the cohabitation statute, creates a rebuttable presumption that the recipient of alimony *in futuro* who lives with a third person is either receiving support from the third person or is contributing to the third person’s support and, in either case, no longer needs the previously awarded amount of alimony.

Under Tenn. Code Ann. § 36-5-101(a)(3), cohabitation does not automatically end the right of the recipient to receive alimony; it merely shifts the evidentiary burden in a modification proceeding. *Isbell v. Isbell*, 816 S.W.2d 735, 738 (Tenn. 1991); *Wright*, 83 S.W.3d at 775. Once the presumption arises, the alimony recipient bears the burden of demonstrating a need for the previously awarded alimony, notwithstanding the cohabitation. *Azbill*, 661 S.W.2d at 686; *Wright*, 83 S.W.3d at 775.

Our standard of review for a modification decision has been explained by our Supreme Court:

Because modification of a spousal support award is “factually driven and calls for a careful balancing of numerous factors,” *Cranford v. Cranford*, 772 S.W.2d 48, 50 (Tenn. Ct. App. 1989), a trial court’s decision to modify support payments is given “wide latitude” within its range of discretion, *see Sannella v. Sannella*, 993 S.W.2d 73, 76 (Tenn. Ct. App. 1999). In particular, the question of “[w]hether there has been a sufficient showing of a substantial and material change of circumstances is in the sound discretion of the trial court.” *Watters v. Watters*, 22 S.W.3d 817, 821 (Tenn. Ct. App. 1999) (citations omitted). Accordingly, “[a]ppellate courts are generally disinclined to second-guess a trial judge’s spousal support decision unless it is not supported by the evidence or is contrary to the public policies reflected in the applicable statutes.” *Kinard v. Kinard*, 986 S.W.2d 220, 234 (Tenn. Ct. App. 1998); *see also Goodman v. Goodman*, 8 S.W.3d 289, 293 (Tenn. Ct. App. 1999) (“As a general matter, we are disinclined to alter a trial court’s spousal support decision unless the court manifestly abused its discretion”). When the trial court has set forth its factual findings in the record, we will presume the correctness of these findings so long as the evidence does not preponderate against them. *See, e.g., Crabtree v. Crabtree*, 16 S.W.3d 356, 360 (Tenn. 2000); *see also* Tenn. R. App. P. 13(d).

Bogan, 60 S.W.3d at 727.

On appeal, Mr. Woodall argues that Ms. Woodall significantly contributed to Mr. Bishop's support and, because of that, her right to alimony should be eliminated entirely. He also argues that since she no longer has expenses related to their son,⁶ her alimony should be reduced accordingly. Finally, he argues that she could work more and/or rent a chair in her shop (for \$150-\$175 per month he estimates) and that he "should not be punished for [her] idleness."

II. CHANGE OF CIRCUMSTANCES

As stated above, a substantial and material change of circumstances must be something that was unforeseeable or unanticipated by the parties at the time of divorce and must affect either the obligor spouse's ability to pay or the obligee spouse's need for support. Besides Ms. Woodall's cohabitation with Mr. Bishop, Mr. Woodall alleges two other changes of circumstances.

With regard to the assertion that Ms. Woodall's discontinuation of support of the parties' youngest son since he finished college, the trial court determined that the son's leaving home following college and no longer needing Ms. Woodall's financial support was not unforeseeable or unanticipated at the time the initial award of alimony was set in 1997 and was, therefore, not a material change of circumstances. We affirm that holding.

Additionally, the trial court found Mr. Woodall's argument that his former wife could improve her financial situation by simply renting chairs in her beauty salon to other beauticians failed to establish a substantial and material change of circumstances. Ms. Woodall explained that it is difficult to find the right person to work in the salon and that her long standing renter had moved prior to the divorce. At the time of the divorce, she occupied the salon alone and was limited, due to her medical problems, in the amount of time she could spend standing and cutting hair. The trial court found that because Ms. Woodall was not renting chairs in the salon at the time of the divorce, it was neither unforeseeable nor unanticipated that she would continue her practice of working alone. We affirm the trial court's holding that Mr. Woodall failed to prove a substantial and material change of circumstances with respect to the way Ms. Woodall chose to run her business.

Thus, the success of Mr. Woodall's allegations that a substantial and material change of circumstances occurred since the divorce that justified elimination or reduction of his alimony payments must depend on the cohabitation statute and its application to the facts of this case.

⁶At the time of the divorce, the parties' youngest son was beginning college, but was twenty-four years old and no longer living at home at the time of the modification hearing. Ms. Woodall testified that at the time of the divorce, when she learned her former husband could not be required to help pay their adult son's expenses at the local community college, she asked for an amount of alimony that would allow her to help her son.

III. COHABITATION

There is no dispute that Ms. Woodall lived with Mr. Bishop beginning in 2001 but ended the arrangement shortly after her former husband filed his petition for modification of alimony.⁷ There is also no dispute that when Ms. Woodall first moved in with Mr. Bishop, their relationship was romantic in nature, but changed to one of caretaker/patient following Mr. Bishop's cancer diagnosis and treatment. Indeed, Mr. Bishop credits Ms. Woodall as saving his life during his illness since he had no family to care for him. As the trial court correctly pointed out, the nature of the relationship is irrelevant to the statute. Tenn. Code Ann. § 36-5-101(a)(3) provides:

(3) In all cases where a person is receiving alimony in futuro and the alimony recipient lives with a third person, a rebuttable presumption is thereby raised that:

(A) The third person is contributing to the support of the alimony recipient and the alimony recipient therefore does not need the amount of support previously awarded, and the court therefore should suspend all or part of the alimony obligation of the former spouse; or

(B) The third person is receiving support from the alimony recipient and the alimony recipient therefore does not need the amount of alimony previously awarded and the court therefore should suspend all or part of the alimony obligation of the former spouse. This subdivision (a)(3) shall in no way be construed to create any common-law marriage obligation as to third parties.

Both Mr. Bishop and Ms. Woodall testified as to their financial arrangement. Ms. Woodall moved out of a rented apartment into Mr. Bishop's house. She insisted on paying her way, and they agreed that she would contribute to the household expenses \$500 per month. She paid this amount in cash, giving Mr. Bishop differing amounts on a weekly basis. He used this money to pay utilities and to help defray other household expenses. Mr. Bishop never gave Ms. Woodall any money or helped her in any way financially.

The trial court found that while Ms. Woodall had lived with Mr. Bishop in the past, she no longer did so. She had moved out of Mr. Bishop's house and rented an apartment, for which she paid \$ 450 in rent, with utilities averaging \$ 50. Thus, the \$500 per month she paid to Mr. Bishop appears to have been in line with the rents and expenses paid in the area.

We must first address what impact, if any, the cessation of the cohabitation has. Mr. Woodall argues that since Ms. Woodall lived with Mr. Bishop for a few months, Mr. Woodall should be

⁷Ms. Woodall testified that "I didn't know that I couldn't live with someone. I figured if he could go off and live with someone that caused the divorce, then I could live with someone and it was okay. I thought I couldn't get married or I had to die."

entirely and permanently relieved of his obligation to pay alimony that was ordered at the dissolution of a twenty-six year marriage.

We begin by holding that the evidence does not preponderate against the trial court's finding that Ms. Woodall was not living with Mr. Bishop at the time of the hearing. This finding is important because the situation that existed at the time of trial must be considered in applying the statute. That is because, first, the statute uses the present tense, "In all cases where a person is receiving alimony in futuro and the alimony recipient **lives** with a third person" Tenn. Code Ann. § 36-5-101(a)(3)(emphasis added). Second, even if the presumptions of support and lack of need arise and are un rebutted, the court's remedy is to "**suspend** all or part of the alimony obligation," not terminate the alimony. Tenn. Code Ann. § 36-5-101(a)(3)(A) and (B) (emphasis added). The clear implication is that if the situation justifying suspension ceases to exist, the alimony recipient may seek reinstatement of support from the former spouse. *See Azbill*, 661 S.W.2d at 687 (ordering suspension of alimony payments from the date of the filing of the modification petition "until such time as a change of circumstances warrants reinstatement in whole or in part"). *Id.* at 687.

Thus, a cohabiting alimony recipient whose alimony is suspended in whole or in part on the basis of Tenn. Code Ann. § 36-5-101(a)(3) could later seek a reinstatement or modification based on changed circumstances, specifically that he or she is no longer living with a third person and is no longer receiving any support from, or contributing support to, that person. We can see no authority for, and no purpose to be served by, requiring a ruling based on past cohabitation and the filing and hearing of a subsequent request for reinstatement when cohabitation ceases before the trial on the original modification petition.⁸ The trial court should, as did the court herein, consider the situation that existed at trial.

Even though the court found that Ms. Woodall was no longer living with Mr. Bishop, it nonetheless determined that the burden had shifted to Ms. Woodall to prove she still needed the amount of alimony originally awarded. The court apparently considered her expenses at the time of trial, not during the cohabitation, as reflective of her needs. This procedure is inconsistent with the provisions of Tenn Code Ann. § 36-5-101(a)(3).

⁸We are mindful that a modification petition based on cohabitation will often trigger an end to that cohabitation. Faced with a potential loss of support, an alimony recipient could predictably choose to end the situation that jeopardizes that support, as did Ms. Woodall. Whether the change in residence of the alimony recipient is genuine and permanent is a factual question to be determined by the fact finder, and Mr. Woodall does not argue that Ms. Woodall's moving out of Mr. Bishop's house was a subterfuge. Even where the move is determined to be genuine, however, the paying former spouse may be entitled to some relief, in the form of suspension of all or part of the alimony payments, from the time of the filing of the modification petition until the cohabitation ceases. The appropriateness of such relief would, of course, depend on the facts and particularly whether the recipient rebutted the presumption of lack of need during the relevant period. Mr. Woodall's alimony was suspended for a while during the pendency of his petition. However, the trial court reinstated the alimony obligation back to the date of the suspension order, but in the modified amount.

The statute makes clear that the only basis for an examination of continuing need in this situation is because of the presumption that the alimony recipient is either contributing to the support of the other person or is receiving support from that person and “**therefore**” no longer needs the amount of alimony awarded. The statute requires a connection between the presumptive support from or to the cohabitating third party and the lack of need. No such connection was explicitly found in this case. Further, since the cohabitation had ended by the time of the trial, the wife’s current need was not put at issue absent a substantial and material change of circumstances.

With regard to the time Ms. Woodall lived with Mr. Bishop, the trial court did state that “Mr. Bishop provided relatively little support for Ms. Woodall.” That finding is supported by the evidence. On appeal, Mr. Woodall argues that Ms. Woodall contributed to the support of Mr. Bishop; that is, that her \$500 per month contribution to expenses allowed Mr. Bishop to use his money for other things.⁹ The trial court did not make an explicit finding that Ms. Woodall was contributing to the support of Mr. Bishop during their cohabitation.

The evidence before us is less than convincing either way. However, Ms. Woodall had the burden of offering proof to rebut the statutory presumption. In addition, the trial court’s holding that the burden of proof had shifted to Ms. Woodall to prove her continued need implies that the court found that the presumption had not been overcome. We cannot conclude that the evidence preponderates against that implied finding or that Ms. Woodall overcame the presumption that her contribution to the household expenses contributed to the support of Mr. Bishop. He owned the house they lived in, and no proof was offered to show that the \$500 per month she paid him was offset by additional expenses attributable only to her.

Even if the court had found that Ms. Woodall was living with Mr. Bishop and was supporting him, those findings would have merely shifted to her the burden to rebut the presumption that she did not need the amount of alimony previously awarded. Although the trial court based its decision on her continuing need on post-cohabitation circumstances, there was similarity between the amount she paid Mr. Bishop monthly and the amount she paid in rent and utilities after she moved out. The amounts were essentially equal. Ms. Woodall has not argued that her expenses were significantly different while she lived with Mr. Bishop.¹⁰

⁹As for Ms. Woodall’s assistance to Mr. Bishop upon his becoming ill, it was merely the type of support individuals afford friends. We see nothing to indicate Ms. Woodall’s caring for Mr. Bishop indicated she was using her alimony to financially support him.

¹⁰On that basis, we can interpret the trial court’s ruling as a determination that Ms. Woodall did not need the total amount of alimony each month while she was living with Mr. Bishop. Such a finding would support a reduction in alimony for the months of cohabitation after the petition was filed.

The trial court found that Ms. Woodall had a continuing need for alimony to supplement her beauty salon business income in order to meet her expenses.¹¹ Based upon the trial court's findings of fact, which we find are supported by the evidence in the record, we affirm the trial court's holding that Ms. Woodall was in need of continuing alimony payments.

Accordingly, we conclude that the trial court acted within its discretion in declining to eliminate or reduce further the alimony *in futuro*. While we have questions about the basis for the prospective reduction ordered by the court, Ms. Woodall specifically waived any objection to or appeal of the reduction. Consequently, we affirm the court's judgment.

CONCLUSION

We affirm the trial court's denial of Mr. Woodall's petition for elimination of spousal support. Costs of this appeal are taxed to the appellant, Harry Michael Woodall.

PATRICIA J. COTTRELL, JUDGE

¹¹According to Ms. Woodall, she takes home \$300 per week from the salon for a monthly income of \$1200. Her rent for her apartment and the shop, utilities for both, gas, phones for both, health and car insurance, consumer loan payments, and groceries totaled well over \$2000 per month.